Supreme Court, U.S.
FILED
JAN 9 1997
CLERK

No. 96-946

In The

Supreme Court of the United States

October Term, 1996

LAURENCE S. FORDHAM,

Petitioner,

vs.

MASSACHUSETTS BAR COUNSEL,

Respondent.

On Petition for Writ of Certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts

AMICI CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOHN J. CURTIN, JR.
Counsel of Record
BINGHAM, DANA & GOULD
Attorneys for Amici Curiae
150 Federal Street
20th Floor
Boston, Massachusetts 02110
(617) 951-8000

70121 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

19 pp

TABLE OF CONTENTS

	Page
Interest of Amici	1
Consent By the Parties	1
Reasons for Granting the Writ	1
Conclusion	13

TABLE OF CITATIONS

Cases Cited:

Beatty v. NP Corp., 581 N.E. 2d 1311 (Mass. App. 1991) 12

Gentile v. State Bar of Nevada, 501 U.S. 1030, 111 S. Ct. 2720 (1991) 5, 10

Goldfarb v. Virginia State Bar, 423 U.S. 773 (1975) .. 5

In re Ruffalo, 390 U.S. 544 (1968) 5, 6, 7, 11

Rubin v. Taylor, 294 N.E. 2d 544 (Mass. App. 1973) 12

Other Authorities Cited:

American Bar Association Code of Professional Responsibility Annotated, p. 101 (O. Maru ed. 1979) 9, 10

Contents

Page

Drinker, *Legal Ethics*, p. 174 (1953) 10

Kaufman, *Problems in Professional Responsibility, Note: Disciplinary Rule — Problems of Generality*, pp. 667-669 (3rd ed. 1989) 6, 9

Restatement (Third) of the Law Governing Lawyers, Reporter's Note, section 46, Comment f 2, 10

Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction*, 48 Texas L. Rev. 225 1

Wolfram, *Modern Legal Ethics*, § 9.3, p. 516 (1986) .. 2, 10

INTEREST OF AMICI

The amici respectfully urge the Court to grant the Petition because the Court's guidance is necessary on an issue of importance to the bar and to the administration of justice.

The amici primarily are active practicing trial lawyers threatened by the decision of the state court imposing discipline upon an experienced and respected trial lawyer "on what is essentially a standardless *ad hoc* basis." Sutton, *The American Bar Association Code of Professional Responsibility: An Introduction,* 48 Texas L. Rev. 225, 263. (The author was Reporter in the adoption of the Code of Professional Responsibility by the American Bar Association.) The remaining amici are professors who are authorities in professional responsibility.

CONSENT BY THE PARTIES

Written consent to file this amicus brief has been obtained from all parties to the action. The written consents are lodged herewith.

REASONS FOR GRANTING THE WRIT

The issue presented by this petition is this: Consistent with the due process clause, may discipline be imposed on an attorney based upon an *ad hoc,* after the fact, application of a vague disciplinary rule (DR 2-106), by ill-defined, unprecedented standard.

This is especially so when, the record shows that, there was a strong consensus among responsible members of the bar that the attorney's conduct was proper.

Discipline was imposed despite the heretofore well established disciplinary standard of unconscionability, described in Massachusetts in the adoption of the rule as "egregious overreaching. . . ." Petition of Boston Bar Association to adopt the Canons and Disciplinary Rules in the Code of Professional Responsibility adopted by the American Bar Association, Supreme Judicial Court for Suffolk County, No. 7631, Report of Special Master (retired Justice of the Supreme Judicial Court John K. Spaulding) dated April 13, 1972 pp. 25-26, reproduced in pertinent part in the petition at Pet. 87a (80a - 87a).[1] There was no forewarning by the state court that this standard would *not* be applied.

The state court's unprecedented application of the rule means "[t]he standard . . . is necessarily vague . . . and thus uncertain in its application." Wolfram, *Modern Legal Ethics*, § 9.3, p. 516 (1986).

The decision disregards a high body of heretofore consistent precedent establishing a much more stringent standard as a basis for discipline in case law and secondary authorities (Pet. 9). The disregarded standard is recognized in the Final Draft Restatement (Third) of the Law Governing Lawyers, Reporter's Note, section 46, Comment f, of "standards for lawyer discipline," and cases cited. The decision ignores the heretofore well-established standard. The decision explicitly rejects the established standard and declines to find even "overreaching" (Pet. 21a - 22a), much less "egregious overreaching" as required by the Report of Special Master in the judicial history of the adoption of the code in Massachusetts. Nor does the decision provide any elucidation for the guidance of lawyers in the future. Prior precedent is excised. Nothing is provided in its place.

---

1. References to the Appendix to the Petition are to the pertinent pages without repeated reference to the Appendix. Other references are to the petition, by page number.

The underlying facts are few and uncontested. Laurence S. Fordham, a respected senior member of the Massachusetts bar, has been publicly censured by the state court for having charged a "clearly excessive" fee where, by agreement with the client, he charged at his usual hourly rates, there was no allegation that he "padded" his time, and Bar counsel has stipulated that he acted conscientiously, diligently and in good faith, in the time spent in representing his client and in billing. (Pet. 7a.)

This censure is unprecedented. The client chose Mr. Fordham, knowing the hourly basis of his fees and after interviewing three other lawyers who specialized in driving under the influence cases and who had quoted fixed fees. (Pet. 41a, 52a.) Mr. Fordham is an experienced trial lawyer who disclosed to the client that he had no experience in driving under the influence cases or other criminal matters. (Pet. 4a.)

The client was charged with two criminal offenses, driving under the influence and driving with a license under suspension for multiple speeding offenses, and two civil offenses, speeding and driving an unregistered motor vehicle. (Pet. 43a - 45a.) He was driving erratically at 55 m.p.h. in a 35 m.p.h. zone; had a more than half empty bottle of vodka in his car; had alcohol on his breath, slurred speech, and a flushed face; was unsteady on his feet when he got out of the car; failed field sobriety tests, including the alphabet test and the test of walking heel and toe; had breath test readings of .10 and .12, both above the presumptive level of intoxication; and later executed an affidavit making false assertions about warnings to which he declined to testify in court. (Pet. 40a; R. 74-77, Ex. 2; R. 87-88, 107-11; R. 1245.)

The results that petitioner obtained for his client were exceptional in view of very strong evidence against the defendant. The breath tests were suppressed by a "creative"

and "impressive" argument that the two tests were not "within .02" as required by law. (Pet. 5a, 13a.) After trial, there was a "not guilty" verdict for driving under the influence. (Pet. 5a.) Petitioner obtained by motion the dismissal of the criminal charge of driving with a suspended license for multiple prior speeding offenses. (Pet. 44a.) The client paid a $50 fine with no further suspension for speeding, and $50 costs for operating an unregistered motor vehicle. (R. 1293.)

I.

Professor John Leubsdorf captured the essence of the concern in a Memorandum in Support of Petition for Rehearing in the court below, stating as follows:

> A reasonable lawyer following Massachusetts caselaw on fees as between lawyer and client would have been amazed at the thought that the fee here could be held to be grounds for discipline. In the less demanding area of fee disputes, courts have upheld far more questionable arrangements than those here. *Cummings v. National Shawmut Bank,* 284 Mass. 563 (1933); *First National Bank v. Brink,* 372 Mass. 257 (1977); *Mulhern v. Roach,* 398 Mass. 18 (1986). In these cases, the client had never agreed to the fee basis, yet a very large fee was nevertheless upheld; in the second case, fiduciary relationships in addition to the lawyer-client relationship were also involved, yet still the fee was upheld. The courts have likewise declined to set aside large fees under fee contracts. *Rubin v. Taylor,* 1 Mass. App. 208 (1973); *Johnson v. Blacke,* 32 Mass. App.

> 399 (1992); see *Gagnon v. Shoblom*, 409 Mass. 63 (1991).
>
> This Court can reject the principles of these cases, but it has not heretofore done so. There was no fair notice here that the fee in question was unenforceable, much less that it was a disciplinary offense.

Id., pp. 3-4.

Professor Leubsdorf is the Associate Reporter of the Restatement (Third) of the Law Governing Lawyers, responsible for the portion relative to fees. He joined in this Memorandum in the state court in his individual capacity. He now is one of Petitioner's attorneys in filing the petition.

The cited decisions of the court below are affirmatively misleading in that they repeatedly allow civil recovery of charges substantially in excess of hourly charges for good results. In contrast, here the Court disallows hourly charges although the services were performed diligently, conscientiously and in good faith, and the results were exceptional. Such charges previously have been upheld civilly where the results were unfavorable to the client. (Pet. 16-17.)

Several decisions of this Court support granting the petition. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991); *Goldfarb v. Virginia State Bar*, 423 U.S. 773 (1975). *See also In re Ruffalo*, 390 U.S. 544, 555, 556 (1968) (concurring opinion of Mr. Justice White) (discipline inappropriate on basis of after the fact determination where "responsible attorneys would differ in appraising the propriety of that conduct.") Justice White's concurring opinion in *In re Ruffalo* is renowned, and it has had extraordinary influence in setting the standard, here ignored,

for attorney discipline. *See* references in Report of Special Master (83a, 84a), and Kaufman, *Problems in Professional Responsibility* 668-69 (3d ed. 1989).

The state court decision also is a serious and substantial threat retrospectively and prospectively to the bar generally.

> Where does this leave the determined, no-stone-unturned criminal defenses celebrated by the profession? Apparently a lawyer may mount such a defense, but is forbidden to charge for it, under a fee contract, with the defendant's approval of the specific actions taken, at the lawyer's usual rates. That is wrong.

Id., p.2. The threat of discipline in such circumstances is particularly troubling given the state court's inherently vague standard of excessiveness that replaces the historic, well understood standard of unconscionability. The latter standard was described in the report underlying the adoption of the Code in Massachusetts as "egregious overreaching by the lawyer or the client." Report of Special Master, April 13, 1972, *supra*, p. 2. The Special Master (Retired Justice John K. Spaulding) specifically recognizes a due process violation where, as clearly is the case here, an attorney is "judged by standards that are so vague that men of common intelligence must necessarily guess at meaning or differ as to application." (Pet. 85a.)

Similarly, Justice White's concurring opinion in *In re Ruffalo*, 390 U.S. at 556, enunciated a principle, now well established, that discipline is inappropriate based upon a determination after the fact that conduct is improper where, as clearly is the case here, responsible members of the bar differ as to the propriety of the conduct. Conduct that is improper

and subject to discipline is conduct that "all responsible attorneys would recognize is improper for a member of the profession." *Id.* at 555.

Compelling evidence in support of the fees and the basis for fees in this case was given by many acknowledged leaders of the Bar, including the following: Ms. Carol Ball and Ms. Nancy Gertner, Messrs. Samuel Adams, Edward J. Barshak, Jerry Cohen, John J. Curtin, Jr., Harold Hestnes, Richard G.Huber, Robert W. Meserve, Robert J. Muldoon, Jr., Rudolph F. Pierce, and James D. St. Clair. They include two former presidents of the American Bar Association, former counsel to the President, former president of the Boston Bar Association, the Chairman and Secretary of the Massachusetts Board of Bar Examiners, a former Chairman of the National Conference of Bar Examiners, two former Justices of the Massachusetts Superior Court, a lawyer who has become a Justice of the Massachusetts Superior Court, a lawyer who has become a Judge of the United States District Court for the District of Massachusetts, a former dean of the Boston College Law School and distinguished scholar in the field of professional responsibility, and a subsequent member of the Board of Bar Overseers and respected author and scholar in the field of professional responsibility.

The testimony of Mr. Meserve is particularly significant and instructive. Mr. Meserve was a former president of the Boston and American Bar Associations, the American College of Trial Lawyers and the American Bar Foundation (R. 11: 1479). He was a member of the Clark Committee and chairman of the Kutak Committee, both of the American Bar Association. The former resulted in the formation of the Board of Bar Overseers and the latter in the ABA's promulgation of the Code of Professional Responsibility. He was appointed by the state court in 1984 as the first Chairman of the Board of Bar Overseers of the state. Mr. Meserve testified as follows:

> There is no question . . . but that setting a fee based upon the application of a lawyer's established and reasonable hourly rate to the time devoted to the matter is proper with respect to any matter, including, but not limited to, the defense of criminal charges and regardless of whether any such work is generally handled upon some other fee basis, such as a flat fee, contingency fee or transactional charge.
>
> That being the case, it is and always has been my understanding that where a lawyer is employed on a time-charge basis a fee which results from applying the lawyer's hourly rate to the actual time devoted to the matter in good faith cannot as a matter of law, be a "clearly excessive" fee. In such cases, the client has agreed to pay compensation in proportion to the time devoted to the matter and, so long as the time is devoted in good faith, the fee resulting therefrom cannot be deemed excessive at all, much less "clearly" so. I believe that my understanding in this regard is the general, if not universal, understanding of experienced and responsible lawyers, not merely civil litigators, but in every area of practice.

R. 11: 1483-84.

II.

As a result of the decision below, lawyers generally, and trial lawyers specifically, are made subject to discipline without warning by virtue of a newly fashioned standard that is so vague that even the most prudent lawyers will necessarily be uncertain as to its meaning and application. It is hard to conceive that anyone familiar with previous law in Massachusetts or with the law of professional responsibility generally could have foreseen this decision or the court's departure from the well established disciplinary standard of unconscionability.

Nor does the decision below provide any meaningful guidance for future conduct of lawyers. The decision that the fee here is clearly excessive is standardless, ad hoc in the eye of the beholder, and in disregard of contrary opinion by numerous respected, distinguished, members of the Bar and authorities in the law of professional responsibility.

The operative term "clearly excessive" means what the Court says it means, neither more nor less, and the decision is meaningless as guidance to any responsible member of the bar seeking safe billing practices consistent with responsibilities to the client under Canons 6 and 7.

Indeed, if petitioner is subject to discipline here on a standardless *ad hoc* basis, any lawyer, anytime, anywhere, is equally vulnerable. Petitioner not only is a knowledgeable, experienced, very respected member of the Bar who has distinguished himself by service to clients and to the profession, he is an authority on the law of professional responsibility, having taught it, edited a portion of Professor Kaufman's book, (*see* Preface, Kaufman, *supra*) and served on the members' Consultative Committee of the Restatement of the Law (Third) of the Law Governing Lawyers.

In the particular case, petitioner also had no choice but to provide the services for which he cannot be paid and is disciplined. Contrary to petitioner's advice, despite the strong evidence against him, the client declined to plead guilty and accept an alcohol education program. (Pet. 55a.) Petitioner "was encouraged to press all reasonable avenues of defense and to pursue the case to trial." (Pet. 56a.)

It was stipulated that all billed work was actually done and that Petitioner acted conscientiously, diligently and in good faith in his representation and billing. (Pet. 7a.) The client knew and approved of what Petitioner was doing, received monthly bills, and did not place Petitioner on notice that he objected in any real sense to Petitioner's fees or billing procedures. (Pet. 53a - 54a.)

Gentile v. State Bar of Nevada, supra, holds in part that the words "general" and "elaboration" are "classic terms of degree" with no "settled usage or tradition of interpretation in the law." 111 S. Ct. 2720, 2732 (1991). The same is true here. Wolfram, *Modern Legal Ethics,* § 9.3, p. 516 (1986) notes that "[t]he single standard of an excessive fee is necessarily vague because of the greatly varied settings in which fees are charged, and thus uncertain in its application." By contrast, the discipline standard of unconscionability and its equivalent, egregious overreaching, have a long and well-established history and meaning in case law and secondary authorities. The Final Draft Restatement (Third) of the Law Governing Lawyers recognizes " . . . the generally more stringent standard in discipline cases than in fee disputes." *Id.,* Reporter's note, Sec. 46, Comment f, of "Standards for lawyer discipline," and cases cited. *See also* Drinker, *Legal Ethics,* p. 174 (1953) ("flagrantly excessive"), American Bar Association Code of Professional Responsibility Annotated, p. 101 (O. Maru ed. 1979) (" 'unconscionable' . . ." so exorbitant and wholly disproportionate to the services

rendered as to shock the conscience.' "); *In re Ruffalo, supra* at 555, 556, ; Kaufman, *Problems in Professional Responsibility, Note: Disciplinary Rule—Problems of Generality,* pp. 667-669 (3rd ed. 1989).

Although the decision is a threat to all practicing lawyers, it is a particular threat to trial lawyers who charge at hourly rates for their services in accordance with well established practice in the profession. These lawyers in particular are confounded by a decision which disregards well established precedent in Massachusetts and elsewhere, and also disregards the language of the rules and authorities requiring consideration of all relevant factors of which those cited by the Court are non-exclusive. Although all are to be considered and none are dispositive pursuant to these precedents, the Court further confounds the Bar by making one — the charges of others — dispositive, mentioning one other, and ignoring all others, including such important factors as the importance of the case to the client, "the results obtained" and "the experience, reputation, and ability of the lawyer or lawyers performing the services." (Pet. 2 - 3.)

Petitioner's client, having interviewed three fixed fee driving-under-the-influence specialists, chose a lawyer of reputation, ability and experience as a general trial lawyer, rather than one who handled only driving-under-the-influence cases. By so choosing, the client obtained the benefit of general litigating skills, and a fresh perspective on driving-under-the-influence cases that redounded materially to the client's advantage. Of course, this also meant that Petitioner, like other trial lawyers, had to educate himself about that kind of case.

The client also chose a lawyer who charged by the hour, rather than demanding a flat fee paid in advance, as did other lawyers he consulted (Pet. 41a) and as do most criminal defense

lawyers. By so doing, the client avoided having to pay a full fee should the case terminate quickly, and avoided lawyers having a financial incentive to encourage a guilty plea. The client also placed on his lawyer the burdens of collecting the fee should the client fail to pay — as in fact the client did.

Nevertheless, the court without notice punished Petitioner for violating a wholly new standard based on the "customary flat fee" of specialists handling operating-under-influence cases. (Pet. 18a.) Far from intimating any such standard, previous Massachusetts civil authority had indicated that the fee of a lawyer charging by the hour by agreement with the client should not be adjusted on the basis of other factors. *Rubin v. Taylor,* 294 N.E. 2d 544 (Mass. App. 1973); *Beatty v. NP Corp.,* 581 N.E. 2d 1311 (Mass. App. 1991).

Nor had there been any previous hint that all trial lawyers were to base their fees on those charged by specialists, here lawyers limiting themselves to a driving-under-the-influence subspecialty. On the contrary, the Massachusetts rule lists as a relevant factor "[t]he experience, reputation, and ability of the lawyer or lawyers performing the services" — not those of other lawyers handling similar cases on a different basis. (Pet. p.3.) The court did not mention this factor. If apples are to be condemned for not meeting the standards applicable to oranges, due process requires prior notice.

CONCLUSION

The Petition should be granted to provide guidance as to the notice required as a predicate for discipline.

Respectfully submitted,

JOHN J. CURTIN, JR.
BINGHAM, DANA & GOULD
150 Federal Street - 20th Floor
Boston, MA 02110
(617) 951-8000

For:

SAMUEL ADAMS
WARNER & STACKPOLE
75 State Street
Boston, MA 02109
(617) 951-9000

EDWARD J. BARSHAK
SUGARMAN, ROGERS,
BARSHAK & COHEN, PC
101 Merrimac Street
Boston, MA 02114
(617) 227-3030

JEROME GOTKIN
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, PC
One Financial Center
Boston, MA 02111
(617) 542-6000

JOHN M. HARRINGTON, JR.
ROPES & GRAY
One International Place
Boston, MA 02110
(617) 951-7612

HAROLD HESTNES
HALE & DORR
60 State Street
Boston, MA 02109
(617) 526-6616

ROBERT K. LAMERE
Central Artery Tunnel Project
Mail Stop 01-4C-07
One South Station
Boston, MA 02110
(617) 951-6184

WILLIAM F. LOONEY, JR.
LOONEY & GROSSMAN
101 Arch Street
Boston, MA 02110
(617) 951-2800

THOMAS F. MAFFEI
CHOATE, HALL & STEWART
53 State Street
Boston, MA 02109
(617) 248-5000

CORNELIUS J. MOYNIHAN, JR.
PEABODY & BROWN
101 Federal Street
Boston, MA 02110
(617) 345-1000

ROBERT J. MULDOON, JR.
SHERIN AND LODGEN LLP
100 Summer Street
Boston, MA 02110
(617) 426-5720

RUDOLPH F. PIERCE
GOULSTON & STORRS, PC
400 Atlantic Avenue
Boston, MA 02110
(617) 482-1776

R. ROBERT POPEO
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, PC
One Financial Center
Boston, MA 02111
(617) 542-6000

GEORGE J. SKELLY
SKADDEN, ARPS, SLATE,
MEAGHER & FLOM
One Beacon Street
Boston, MA 02108
(617) 573-4800

JOHN PAUL SULLIVAN
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, PC
One Financial Center
Boston, MA 02111
(617) 542-6000

RICHARD G. HUBER[2]
New England School of Law
154-156 Stuart Street
Boston, MA 02116

MONROE H. FREEDMAN[2]
Hofstra University Law School
Hempstead, New York 11550

2. Not a member of the Massachusetts Bar.